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No. 95-270

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1995

WORCESTER COUNTY, MARYLAND, *et al.*,

Petitioners,

v.

HONISS W. CANE, JR., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

In their Petition for a Writ of Certiorari ("Pet.") Petitioners Worcester County, Maryland, *et al.* ("the County") demonstrated that the decisions below conflict with this Court's decision in *Miller v. Johnson*, 115 S. Ct. 2475 (1995). Specifically, the County showed that the Fourth Circuit erred in holding that the County's at-large electoral system violated § 2 of the Voting Rights Act ("VRA") of 1965 *as am.*, 42 U.S.C. § 1973 (1994 Supp.), based on a plan offered by Respondents that subordinated traditional districting principles to racial considerations. *See* Pet. 10-17. The County also showed that the Fourth Circuit erred in failing to apply the "clearly erroneous" standard of review, as required by *Thornburg v. Gingles*, 478 U.S. 30 (1986), and in substituting its judgment for the district court's by directing implementation of a districting plan that the district court never considered as a possible remedy. *See* Pet. 17-19. In light of these conflicts, and the overriding national importance of the issues presented, the County asked this Court to grant certiorari to review the decisions below.

Respondents rebut none of the County's showings. Rather than acknowledge the conflict between the decisions below and *Miller*, Respondents mistakenly characterize the Petition as an attack on the validity of § 2 and *Gingles*, suggesting that the County would prohibit any use of race in redistricting. Respondents' Brief in Opposition ("Opp.") 6-11. Rather than defend the Fourth Circuit's failure to apply proper standards of appellate review, Respondents instead cite the Fourth Circuit's decision to withhold publication of the opinion. Opp. 11-13.

Respondents' arguments have no merit, and thus present no bar to this Court's grant of certiorari. The Court should therefore grant the Petition.

I. RESPONDENTS HAVE NOT REBUTTED THE COUNTY'S SHOWING THAT THE DECISIONS BELOW CONFLICT WITH THIS COURT'S DECISION IN *MILLER*

The County demonstrated that the decisions below contradict *Miller* in two crucial aspects, and thus the plan ordered into effect by the court below is unconstitutional. Pet. 10-17. First, the Fourth Circuit applied the wrong standard in rejecting the County's arguments that Respondents' proposed district was unconstitutional. The Fourth Circuit held (in a footnote) that because the proposed majority-minority district was not "bizarre" and did not "ignore" traditional districting principles, it was constitutional. App. 38a n.6. Yet *Miller* holds that "bizarreness is [not] a necessary element of the constitutional wrong," 115 S. Ct. at 2486, and prohibits plans that *subordinate* traditional districting principles to racial considerations -- not just plans that *ignore* such principles. *Id.* at 2486-88 (majority opinion) and 2499-500 (Ginsburg, J., dissenting).

In addition, the district court justified Respondents' use of race, at the expense of the County's oft-expressed interests in countywide representation and preservation of municipalities, by finding that the plan "merely affirms the existing racial divisions within the County." App. 6a.[1]

[1] Respondents' assertion that "the County, being opposed to any remedy, advanced no interests to support a remedy," Opp. 8, is incorrect. The district court's first remedy opinion recognized that the County did have an interest in "allowing all the citizens to vote for all the candidates" (*i.e.*, countywide representation) and avoiding "divi[sion of] a municipality into two districts or combining two municipalities into the same district" (*i.e.*, preservation of municipalities). App. 24a, 25a. Respondents (Footnote continued)

Similarly, the Fourth Circuit affirmed, citing in part the "community of interest" of African-Americans within the County. App. 38a n.6. *Miller*, however, forbids the assumption that "individuals of the same race share a single political interest." 115 S. Ct. at 2487.

Respondents do not attempt to rebut the County's demonstration that race-conscious redistricting plans must comply with *Miller*. Instead, Respondents claim that "[P]etitioners' basic contention is that *Gingles'* Section 2 analysis is now unconstitutional in light of *Miller*." Opp. 7. Furthermore, they argue that "[t]o accept the County's argument would render *Gingles* a nullity, and would preclude any finding of Section 2 liability or any remedy for minority vote dilution." *Id.* at 11. Finally, they suggest that the County's arguments "bar[] voting rights plaintiffs and courts from taking race into account when establishing proof" of the *Gingles* preconditions. *Id.*

Respondents' arguments are wholly without merit. The County did not argue that *Miller* invalidates § 2 or *Gingles* or that *Miller* prohibits any use of race in redistricting. Instead, the County demonstrated that, as a result of *Miller*, racial considerations in redistricting cannot subordinate traditional districting principles. *See* Pet. 12.[2] Simply put, *Miller* does

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(Footnote continued)

themselves concede, *later in their brief*, that these same interests led the Fourth Circuit to impose Respondents' alternate plan ("Plan B") rather than the one advocated at the first remedy hearing. Opp. 12. It is therefore disingenuous for Respondents to suggest that the County never expressed any interests in support of a remedy.

[2] Consequently, *DeWitt v. Wilson*, 115 S. Ct. 2637 (1995), cited at Opp. 10, supports the County, not Respondents. In *DeWitt*, this Court approved the use of race as one among many

(Footnote continued)

not overturn *Gingles*, but instead places limits on the types of plans § 2 plaintiffs may offer to comply with *Gingles*. Accordingly, the County asked this Court to "clarify that at-large election systems do not violate the VRA when the only proof of a sufficiently numerous and geographically compact minority, which this Court in *Gingles* deemed a 'precondition[]' to § 2 liability, is a plan" that violates *Miller*. Pet. 11.

In fact, it is Respondents who seem to ask this Court to rewrite *Gingles* when they suggest that "[t]he construction of a plan which contains a majority-minority district is *merely* a precondition * * * that a plaintiff *usually* must satisfy before a court may conduct the totality of circumstances analysis required by Section 2." Opp. 8 (emphasis added). Compliance with *Gingles* is not simply something plaintiffs *usually* must do; it is a *"necessary precondition"* to § 2 liability. 478 U.S. at 50-51 (emphasis added); *Growe v. Emison*, 113 S. Ct. 1075, 1084-85 (1993) (holding that "[a]bsent proof of the *Gingles* preconditions, there neither has been a wrong nor can [there] be a remedy" and invalidating a judicially imposed majority-minority district where "the *Gingles* preconditions were not only ignored but were unattainable").[3] Thus, Respondents' reading of *Gingles'*

(Footnote continued)

factors to be considered in redistricting. Respondents' plan, on the other hand, was described *by their own expert* as being based primarily on racial considerations. Pet. 4, App. 84a. Consequently, Respondents' use of race is more similar to the racial gerrymandering condemned in *Miller* than the more balanced approach upheld in *DeWitt*.

[3] Indeed, *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993), cited by Respondents, Opp. 9, reaffirms the rule that § 2 plaintiffs must satisfy *Gingles'* compactness precondition. 113 S. Ct. at 1157.

compactness requirement conflicts not only with *Miller*, but also with *Gingles* itself.[4]

Nor can Respondents distinguish this case from *Miller* by asserting that "the action of a legislature in adopting a redistricting plan [that violates *Miller*] is vastly different from the actions of a plaintiff in presenting, and a court in resolving, a complex Section 2 challenge." Opp. 8. This Court has made clear that federal courts have less freedom than legislatures in fashioning remedies for VRA violations. *See Voinovich v. Quilter*, 113 S. Ct. 1149, 1156 (1993) ("federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law * * * But that does not mean that the States' powers are similarly limited" because "it is the domain of the States, and not the federal courts, to conduct apportionment in the first place") (internal citation omitted); *Upham v. Seamon*, 456 U.S. 37, 43 (1982) (court may only alter a legislatively enacted plan to the extent necessary to remedy VRA violation); *Shaw v. Hunt*, 861 F. Supp. 408, 434 n.21, (E.D.N.C. 1994) (three-judge court), *prob. juris.*

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[4] Even if the *Gingles* compactness requirement could somehow be overcome by a court's "detailed findings of vote dilution" resulting from a "complex totality-of-circumstances analysis," as Respondents suggest, Opp. 8, the district court's totality-of-circumstances findings were not "extensive," Opp. 3, or "detailed," Opp. 6, nor was its analysis complex. The district court's totality of circumstances analysis occupies only three paragraphs in its liability opinion, and consists of a cursory review of the history of state and local race relations, followed by a conclusory statement that the County's at-large electoral system violates the VRA. App. 14a-15a. This analysis is hardly "detailed" or "complex" enough to outweigh Respondents' failure to satisfy *Gingles*.

noted, 115 S. Ct. 2639 (1995). Thus, if a legislature cannot enact a plan that subordinates traditional districting principles to racial considerations, it follows that a federal court may not do so either.

In summary, Respondents' repeated attempts to characterize the County as hostile to existing voting rights law are at once incorrect and non-responsive. The Petition frames an issue of overriding national importance -- whether a court may apply § 2 of the VRA to overturn a local government's electoral system using redistricting plans that violate *Miller*. This issue is especially worthy of this Court's consideration, given that large numbers of local governments use the same electoral system as the County. *See Holder v. Hall*, 114 S. Ct. 2581, 2595 (1994) (Thomas, J., concurring) (noting that 60% of cities nationwide use at-large electoral systems). This Court should therefore grant the Petition.

II. RESPONDENTS HAVE NOT REBUTTED THE COUNTY'S SHOWING THAT THE DECISION BELOW CONFLICTS WITH THIS COURT'S STANDARDS FOR APPELLATE REVIEW OF VOTING RIGHTS CASES

The Petition also demonstrated that the Fourth Circuit applied the wrong standard of review and erroneously substituted its judgment for the district court's by directing implementation of a plan never presented to the district court as a possible remedy. Pet. 17-19. Respondents do not attempt to rebut this demonstration, but instead seek refuge in the Fourth Circuit's decision to withhold publication of its opinion. Opp. 12 (claiming that disposition by unpublished decision "preclude[s] * * * any broad precedential effect" and "presents no issue of broad import [] appropriate for this Court's review"). Respondents suggest further that the

County waived its procedural objections by failing to support the remedial plan that the Fourth Circuit invalidated. *Id.* Finally, Respondents assert that their "Plan B" (the plan the Fourth Circuit directed the district court to implement) had been placed "out on the table" during the district court's liability trial and, thus, was fully examined by the district court as a remedy. *Id.*

Once again, Respondents' assertions are without merit. Whether the Fourth Circuit deemed the issues sufficiently noteworthy to merit publication has no bearing upon the question of whether the appellate court applied the appropriate standard of review. As the County demonstrated, and Respondents' Brief in Opposition does not dispute, the Fourth Circuit's failure to review the district court's remedy opinion using the "clearly erroneous" standard conflicts with this Court's opinion in *Gingles*, 478 U.S. at 79. Furthermore, the decision conflicts with Fifth Circuit precedent requiring detailed findings of fact in § 2 cases. Pet. 18-19 n.18 (citing *Velasquez v. City of Abilene*, 725 F.2d 1017 (5th Cir. 1984)). Given the large number of jurisdictions that use at-large elections, *see Holder*, 114 S. Ct. at 2595, the Fourth Circuit's decision to withhold publication of the opinion should not preclude this Court's consideration of the important issues in this case.

Furthermore, Respondents' assertion that the County failed to support the district court's remedy in oral argument before the Fourth Circuit is incorrect. Although the County opposed the district court's decision to impose cumulative voting for the general election, the County affirmatively supported the district court's decision to use the single-member districting plan proposed by the County for the primary election. *See* Brief of Appellants/ Cross-Appellees Worcester County *et al.*, *Worcester County, et al. v. Cane, et al.*, Nos. 95-1122, 95-1688 at 23-31 (4th

Cir. April 12, 1995) (arguing that district court correctly imposed County's single-member districting plan for primary, but erred in failing to impose same for general election).

Finally, contrary to Respondents' assertions, Plan B was not "on the table" as a proposed remedy from the moment it was introduced at the district court's liability trial. In fact, Respondents *never offered Plan B* when the district court asked for proposed remedies.[5] Thus, if Plan B were ever "on the table" as a proposed remedy, as Respondents assert, they subsequently took it "off the table." Consequently, the district court never could have "fully examined" Plan B as a remedy.

In summary, Respondents' answers to the County's demonstration that the Fourth Circuit failed to apply the proper standards for appellate review are as flawed as those made in response to the County's constitutional objections. Respondents neither rebut the substance of the County's points nor make any other valid arguments. This Court should therefore grant the Petition.

CONCLUSION

The decisions below present issues of overriding national importance and conflict with decisions of this Court, and Respondents have failed to answer the points made in the Petition. Therefore, this Court should issue the writ to review the Fourth Circuit's use of a racially motivated single-member districting plan to invalidate and replace the County's at-large election system. Failing that, the Court should withhold its disposition of the Petition pending the

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[5] App. 23a (first remedial opinion; Respondents offer Plan A and cumulative voting system); App. 54a (second remedial hearing; Respondents offer Plan A).

decisions in *Shaw v. Hunt*, *supra*, and *Bush v. Vera*, *prob. juris. noted*, 115 S. Ct. 2639 (1995), which will likely shed further light on this case.

Dated: September 28, 1995

Respectfully submitted,

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